SUPREME COURT U. S.

DEC 2 1967

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 873

ARCHIE COSTA,
PETITIONER,

v.

STATE OF CONNECTICUT,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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Statement of Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

Statement of Issues

The Defendant contends that he was deprived of the effective aid of counsel in conducting his defense because his counsel undertook to represent both the Defendant and his brother, a co-defendant. The Defendant was innocent of the charges brought against him whereas his brother was guilty as charged and had committed certain acts which implicated the Defendant. This situation operated to deprive the Defendant of his right to the effective aid of counsel as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States. The Defendant's motion to set aside the verdict should have been granted and the court below erred in refusing to so order.

Question Presented

1. Was Defendant deprived of the effective aid of counsel as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States?

Constitutional Provisions

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously

ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

In August of 1964, the Bartlett Tree Expert Company subcontracted to clear a right-of-way 185 miles long through the States of New York, Massachusetts, and Connecticut, with the I. T. Kellogg Company as the supervising general contractor for work conducted in Connecticut. (Tr. A-8). The union serving Kellogg selected Archie Costa as its steward (Tr. A-76) and the union serving Bartlett selected Archie's brother, Alexander Costa, as its steward. (Tr. A-15.)

Listed as employed by Bartlett were Mario T. Lusa (Tr. A-46), Raymond Maritano (Tr. A-47), Arman Corpaci (Tr. A-48) and Carnio Summa (Tr. A-48), none of whom actually worked for either Bartlett or Kellogg at this or any other time (Tr. E-52, F-34), but all of whom were falsely placed on personnel records and time sheets,

with payroll checks issued regularly (Tr. B-35, B-70.) The crew chiefs pertinently involved, Herbert Lehmann, Jr. and Edward W. Soja, Jr., were hired as such by Alexander Costa. (Tr. A-39.) False application blanks were countersigned and filed with Bartlett by Alexander Costa; and checks made payable to Lusa, Maritano, Corpaci and Summa were endorsed in their names by Alexander Costa and cashed by him at a Torrington, Connecticut bank. (Tr. B-123.)

On October 5, 1965, Archie Costa and Alexander Costa were brought to trial to face five counts each: four of forgery and one of conspiracy. On October 20, 1965, the brothers were convicted of all counts. At the trial, Connecticut State Police Lt. George J. Fagan testified that some of the forged signatures on the checks were made by Archie Costa (Tr. D-6, E-3), using for comparison purposes writings known to be those of Archie Costa obtained by Connecticut State Police Detective Frederick Rebillard at a State Police Barracks (Tr. C-6, C-36).

Before and during the trial both the defendant and his brother Alexander were represented by one attorney — F. Patrick Zailckas, of Waterbury, Connecticut — who acted without co-counsel. Alexander Costa did not plead guilty to the five-count indictment, but took the stand and admitted to having committed the offenses charged against him. In addition, he testified that he had traced the names of Corpaci, Lusa, Martitano and Summa from an employee list which was in Archie Costa's (the defendant's) handwriting, placing these traced signatures on the backs of the respective checks, all of which was done without the knowledge or connivance of the defendant.

Alexander, in other words, accounted for those signatures believed by Lt. Fagan to be in Archie Costa's handwriting as tracings which he (Alexander) had accomplished.

The defendant Archie Costa did not testify, and the defense called no handwriting expert.

Reasons for Allowance of the Writ

We bring to this Court but one issue, which relates to the problem of dual representation by a single lawyer in the face of possible conflicting interests between co-defendants.

It should at the outset be clearly stated that there is in this appeal no purpose—express or implicit—to impugn in any manner able trial counsel, Mr. Zailckas. There is no allegation of bad faith, or of deliberately subverting the interest of one co-defendant to serve another. We simply aver that the practice of dual representation in criminal cases is a hazardous one, fraught with danger that one or the other of the co-defendants may suffer in the process, and ought to be tolerated only in those situations where two or more defendants stand in precisely the same shoes.

The facts in the instant case, admittedly, seem to suggest that if either defendant suffered from having had a joint trial or common counsel it was Alexander Costa, rather than the defendant: for Alexander seriously incriminated himself with his testimony, and in the process admitted to complicity in those crimes laid to the defendant, Archie. But these facts notwithstanding, we propose to show that there was at the trial a set of circumstances which operated to preclude, and did preclude, that kind of single-minded and undivided representation contemplated by our fundamental and essential jurisprudential right in the accusatorial system: The right to the *effective* aid of counsel.

It is well-settled that where there is a *possible* diminution in representation because of conflict between two defendants, each must have separate counsel. In *Glasser* v. *United States*, 315 U.S. 60, 62 S.Ct. 457, an attorney and

former Assistant United States Attorney were tried for conspiracy to defraud the United States.

During the course of the trial, the District Court Judge sought to appoint Glasser's counsel to represent one of the other co-defendants. This was done with Glasser's silence as consent. The Supreme Court set the judgments of conviction aside because of conflicting interests between the co-defendants and resulting ineffective representation, saying that:

> "In conspiracy cases, where the liberal rules of evidence and the wide latitude accorded the prosecution may, and sometimes do, operate unfairly against an individual defendant, it is especially important that he be given the benefit of the undivided assistance of his counsel."

Glasser v. *United States,* 315 U.S. 76, 62 S. Ct. 468.

In a case somewhat similar to the case at bar, *Holland* v. *Boles,* 255 F. Supp. 863, a brother and sister were jointly indicted for murder. As a result of the efforts of one lawyer who represented both, the brother pleaded guilty to murder and the sister to manslaughter. The brother subsequently brought habeas corpus because of ineffective representation of counsel, alleging the conflict between himself and his sister as the basis for his claim. Relief was granted, on the ground presented.

There are other cases in point. Cf. *People* v. *Bopp,* 279 Ill. 184, and *Hammond* v. *McIntyre,* 114 Cal. App. 2d 148.

We assume that counsel for the State will agree that where some conflict between defendants is shown, separate counsel are essential. The issue, therefore, is whether or not *this* defendant suffered any harm from the joint representation. We contend that although such harm may not

be open and obvious upon the record, it must be assumed that he did.

First, and as a matter of firm principle, we believe that under no circumstances can one attorney jointly represent two defendants who must stand trial together, one of whom is innocent and the other guilty. Where the defendants are brothers, the aggravation of the conflict is even more evident, for there is, assumptively, between brothers a strong tendency for one to protect the other at his own expense.

In the case at bar Defense Attorney Zailckas made an apparent and deliberate effort to exonerate Archie Costa by permitting Alexander to incriminate himself and own up to the acts alleged against both. However, Alexander did *not* plead guilty. From the testimony he gave, he certainly should have done so. His plea of not guilty, in the eyes of a lay jury, was a denial of his guilt. They were charged to deliberate his innocence, along with that of Archie. The tactics employed, therefore, cannot help but have prejudiced Archie in the jury's eyes, especially since Archie did not testify.

Although it may well be that it was defense strategy from the outset of the trial to allow Alexander to hang himself for Archie's benefit, the jury could not have known this. They may have concluded from Alexander's plea of innocence that he intended to escape conviction if he could, and only after he heard the State's case decided to testify as he did.

Alexander's credibility as a defense witness was of critical importance to Archie—for indeed, in order to test the prejudice which may have resulted from the circumstances herein complained of, this Court must assume that, as the defendant claims, he was in fact innocent and Alexander in fact implicated him in the crimes by copying his hand-

writing. If Alexander had been believed, Archie would have, in all probability, been acquitted.

It is doubtful that any defense lawyer representing Archie individually would have adopted the strategy or tactics used by counsel here, for the risk to Archie's defense, and to Archie's critical witness—Alexander—was too evident. For this reason, and despite the sincerity and ability of counsel who did seek to assume a greater burden than one lawyer ought to be asked or permitted to shoulder, the defendant should be afforded a new trial. In such proceeding, with Alexander's guilt a matter of record, and with Alexander a witness instead of a co-defendant, the defendant might have a proper chance to have his evidence fairly weighed, untainted by those steps taken by Alexander as a party to the proceeding.

Conclusion

Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of the State of Connecticut, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be named therein, a full and complete transcript of the proceedings of that Court herein, being the case numbered No. 6052, *State of Connecticut* v. *Archie Costa et al*, and that the judgment of that court be reviewed by this Court, and for such other relief as to this Court may seem proper.

Dated this 30th day of November, 1967.

ARCHIE COSTA,
Petitioner

By his attorneys,

F. LEE BAILEY,
RICHARD STEWART,
IRA L. SCHREIBER

Appendix A

OPINION
SUPREME COURT
May Term, 1967

STATE OF CONNETICUT *v.* ARCHIE COSTA

Information charging the defendant with the crimes of conspiracy to obtain money by false pretenses and forgery, brought to the Superior Court in Litchfield County and tried to the jury before *Covello, J.;* verdict and judgment of guilty and appeal by the defendant. *No error.*

Richard R. Stewart, with whom, on the brief, was *F. Lee Bailey,* of the Massachusetts bar, for the appellant (defendant).

Thomas F. Wall, state's attorney, for the appellee (state).

HOUSE, J. The defendant, Archie Costa, and his brother Alexander J. Costa were each charged with four counts of forgery and one of conspiracy to obtain money by false pretenses. Both brothers, who retained the same attorney to represent them, pleaded not guilty and were tried together before a jury, and each was convicted on all five counts. Motions to set aside the verdicts were denied. The defendant, now represented by different counsel, alone has appealed. His sole claim on appeal is that he was deprived of the right to the effective aid of trial counsel because that counsel represented both him and his brother.

As in *State* v. *Hunt,* 154 Conn. 517, 523, 227 A.2d 69, "no motion was made at any time . . . for separate counsel. As far as appears the court's attention was never directed to . . . [this] matter, and it was never at any time called upon to exercise its discretion in . . . [this] respect." Although the defendant in his brief claims that, because he was deprived of the right to the effective aid of trial coun-

sel, the trial court erred in denying his motion to set aside the verdict, there is nothing in the record to show that that claim was ever at any time raised in the trial court, either in connection with that motion or otherwise. Since the trial court was never asked to rule on the claim now advanced by the defendant, under settled Connecticut practice it cannot now be considered. *State* v. *Darwin*, 155 Conn. (28 Conn. L.J., No. 50, pp. 3, 8) see *State* v. *Vars*, 154 Conn. 255, 271, 224 A.2d 744; *State* v. *Annunziato*, 154 Conn. 41, 44, 221 A.2d 57. Since no ruling was made by the trial court, there is nothing to which error now may be assigned. "[T]his policy does not permit a defendant in a criminal case to fail, whether from a mistake of law, inattention or design, to object to matters occurring during a trial until it is too late for them to be corrected or even considered and then, if the outcome proves unsatisfactory, to raise them for the first time on an appeal." *State* v. *Taylor*, 153 Conn. 72, 86, 214 A.2d 362, cert. denied, 384 U.S. 921, 86 S. Ct. 1372, 16 L. Ed. 2d 442; see also Practice Book § 652; *State* v. *Hunt, supra; State* v. *Vars*, supra; *State* v. *DeGennaro*, 147 Conn. 296, 304, 160 A.2d 480, cert denied, 364 U.S. 873, 81 S. Ct. 116, 5 L. Ed. 2d 95.

This case well illustrates the necessity for the rule (Practice Book § 652) that this court, as an appellate court of review, shall not be bound to consider any errors on an appeal unless it appears on the record that the question was distinctly raised at the trial and was ruled upon and decided by the court adversely to the appellant's claim, or that it arose subsequent to the trial. Nor does it fall within the limited exception to that rule as required by the holding in *O'Connor* v. *Ohio*, 385 U.S. 92, 93, 87 S. Ct. 252, 17 L. Ed. 2d 189. See *State* v. *Darwin*, supra. Nor is there anything in the record which suggests that the trial court should have acted suo motu in this case, a claim advanced for the first time during the oral argument on this appeal.

The following facts are not in dispute. The I. T. Kellogg Company and the Bartlett Tree Expert Company were respectively the supervising general contractor and the subcontractor for clearing the Connecticut portion of a right of way which extended 185 miles through New York Massachusetts and Connecticut. Archie Costa was the steward for the union for Kellogg's employees, and Alexander Costa was the steward for the union for Bartlett's employees. In the usual course of Bartlett's business, a personnel record was prepared by a person applying for employment, and it was countersigned by the supervisor on the Bartlett staff hiring him. What purported to be applications and personnel records of four persons, who were never employees of Bartlett, had been countersigned by Alexander. He also received the payroll checks issued by Bartlett in the names of these four persons. Some of the paychecks made out to these four phantom employees contained endorsements in the name of Alexander Costa, and several were cashed by him but none of the four ever worked for or received any payments for services rendered Bartlett.

The state offered evidence, and claimed to have proved, that some of the forged signatures were written by Archie. Alexander, without changing his plea of not guilty, testified during the trial that he had traced the names which appeared as endorsements on some of the forgeries from an employee list which was in Archie's handwriting. Alexander thereby incriminated himself on the forgery counts but purported to explain the state's evidence against his brother and thus exonerate him.

The claim of the defendant on appeal that he was denied the right to the effective aid of counsel must be considered in the circumstances that his counsel was not appointed by the court. He was selected by the defendant to represent him with full knowledge that the same attorney also represented his brother Alexander. That attorney's competence

is unquestioned. Indeed, in his brief on this appeal, through his new counsel, the defendant disclaims any "purpose—express or implicit—to impugn in any manner able trial counsel."

The defendant's claim has two bases. The first basis is "that under no circumstances can one attorney jointly represent two defendants who must stand trial together, one of whom is innocent and the other guilty." Absent some showing of prejudice, however, the mere fact that codefendants have been represented jointly by the same attorney is insufficient, without more, to require a new trial. *Glasser* v. *United States,* 315 U.S. 60, 77, 62 S. Ct. 457, 86 L. Ed. 680; *United States* v. *Berriel,* 371 F.2d 587 (6th Cir.); *United States* v. *Paz-Sierra,* 367 F.2d 930, 932 (6th Cir.); *United States* v. *Bentvena,* 319 F.2d 916, 937 (2d Cir.); *Mohler* v. *United States,* 312 F.2d 228, 230 (7th Cir.), cert. denied, 374 U.S. 854, 83 S. Ct. 1922, 10 L. Ed. 2d 1074; *Draper* v. *Rhay,* 242 F. Sup. 829, 832 (E.D. Wash.), aff'd, 358 F.2d 304 (9th Cir.), cert. denied, 384 U.S. 993, 86 S. Ct. 1901, 16 L. Ed. 2d 1009; *State* v. *Hunt,* 154 Conn. 517, 524, 227 A.2d 69.

The second basis of the defendant's claim clearly demonstrates the need for raising the claim in the trial court in the first instance in order that there be an adequate record for appellate review. The claim (made with all the wisdom of hindsight) appears to be predicated on a criticism of the trial strategy of original counsel and on a purely speculative conjecture directed to the question of prejudice. It is advanced in the appeal brief in these words: "Although it may well be that it was defense strategy from the outset of the trial to allow Alexander to hang himself for Archie's benefit, the jury could not have known this. They may have concluded from Alexander's plea of innocence that he intended to escape conviction if he could, and only after he had heard the State's case decided to

testify as he did." With nothing in the record to support such a conjecture, we are apparently invited to speculate (1) that had Archie been tried at a time after his brother, for some reason, had chosen to concede his guilt, he would have benefited more from his brother's self-incrimination than he in fact did and (2) that the fact that Archie did not receive this supposed benefit is traceable to both brothers' election to be represented by the same counsel, which the court, suo motu, should have intervened to prevent. An appellate court ought not to be expected to determine the merits of such speculative imaginings. *State* v. *Johnson,* 139 Conn. 89, 93, 90 A.2d 905.

Nothing in the record even suggests that the interests of the two brothers were antagonistic. From all that appears the tactics of trial counsel were "a considered and sound exercise of trial strategy calculated to be in the best interests of each accused." *State* v. *Hunt,* 154 Conn. 517, 524, 227 A.2d 69. "And certainly, trial strategy, even if it proves unsuccessful, is inadequate basis for an attack on the competence of counsel." *United States* v. *Duhart,* 269 F.2d 113, 115 (2d Cir.).

"The record discloses no conflict of interest between [the] defendants, and the appeal points to no substantial prejudice that came to either defendant because of the single attorney's conduct of the defense." *United States* v. *Berriel,* 371 F.2d 587 (6th Cir.). The defendant was afforded every protection which our law gives to any person charged with a crime.

There is no error.

In this opinion the other judges concurred.